

**FILED**

**MAR 23 2012**

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CLERK

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

ARLEN KLINGENBERG,  
Plaintiff,

vs.

COUNTY OF MINNEHAHA and  
KURT SCHAUNAMAN,  
Defendants.

CIV. 11-4024-KES

**FINAL  
INSTRUCTIONS  
TO THE JURY**

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VERDICT FORM

## FINAL INSTRUCTION NO. 1 – INTRODUCTION AND DEFINITIONS

Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of and during the trial are not repeated here.

The instructions I am about to give you now as well as those I gave you earlier are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my oral instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

Neither in these instructions nor in any ruling, action, or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

## FINAL INSTRUCTION NO. 2 – IMPEACHMENT

In Preliminary Instruction No. 3, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness’s present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

You have heard evidence that Klingenberg has been convicted of a crime. You may use that evidence only to help you decide whether or not to believe this witness and how much weight to give his testimony.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight you think it deserves.

If you believe that any witness testifying in this case has knowingly sworn falsely to any material matter in this case, then you may reject all of the testimony of the witness.

### FINAL INSTRUCTION NO. 3 – BURDEN OF PROOF

In civil actions, the party who asserts the affirmative of an issue must prove that issue by the greater weight of the evidence.

Greater weight of the evidence means that after weighing the evidence on both sides there is enough evidence to convince you that something is more than likely true than not true. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue has the greater weight of the evidence, then your finding upon the issue must be against the party who has the burden of proving it. In determining whether or not an issue has been proved by the greater weight of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

FINAL INSTRUCTION NO. 4 – EXCESSIVE FORCE AGAINST SCHAUNAMAN

Klingenberg claims that Schaunaman violated his Fourth and Fourteenth Amendment constitutional rights by using excessive force against him. Your verdict must be for Klingenberg on his excessive force claim if Klingenberg has proved all the following elements by the greater weight of the evidence:

***One, Schaunaman struck Klingenberg;***

***Two, the use of such force was excessive because it was not reasonably necessary to restore order;***

***And three, as a direct result, Klingenberg was damaged.***

In determining whether the force was excessive, you must consider such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether it was used for punishment or instead to achieve a legitimate purpose such as maintaining order or security within the Minnehaha County Jail and whether a reasonable officer on the scene would have used such force under similar circumstances. You must consider whether Schaunaman's actions are reasonable in the light of the facts and circumstances confronting Schaunaman without regard to Schaunaman's own state of mind, intention, or motivation. If any of the above elements has not been proved, then your verdict must be for Schaunaman.

FINAL INSTRUCTION NO. 5 – FAILURE TO TRAIN AGAINST THE COUNTY

Your verdict must be in favor of Klingenberg, and against the County, on Klingenberg's claim for failure to train, if Klingenberg has proved all of the following elements by the greater weight of the evidence:

**One, the acts of Schaunaman deprived Klingenberg of his right to be free from excessive force;**

**Two, the County's training practices were inadequate;**

**Three, the County's failure to adequately train amounted to deliberate indifference to the fact that inaction would obviously result in the violation of Klingenberg's right to be free from excessive force;**

Deliberate indifference is established only if there is actual knowledge of a substantial risk that Schaunaman would seriously harm Klingenberg and if the County disregards that risk by intentionally refusing or intentionally failing to take reasonable measures to deal with the problem. Mere negligence or inadvertence does not constitute deliberate indifference.

**And four, the County's failure to adequately train proximately caused the violation of Klingenberg's right to be free from excessive force.**

In order to find that the County's failure to adequately train proximately caused the violation of Klingenberg's federal right, you must find that Klingenberg has proved by the greater weight of the evidence that the County's deliberate indifference led directly to the deprivation of Klingenberg's right to be free from excessive force.

If any of the above elements has not been proved by the greater weight of the evidence, then your verdict must be in favor of the County and against Klingenberg on this claim.

**FINAL INSTRUCTION NO. 5A –LIMITING INSTRUCTION**

The Use of Force Policy (Exhibit 1), the Training Evaluation Summaries (Exhibit 3), and the Minnehaha County Standard Operating Jail Training and Evaluation Program (Exhibit 9), do not establish the standard of care for Schaunaman.

You should consider this evidence solely to determine whether Minnehaha County properly trained Schaunaman.

**FINAL INSTRUCTION NO. 6 – SEPARATE LIABILITY OF EACH DEFENDANT**

Each party is entitled to have the case decided solely on the evidence which applies to that party. In considering the evidence, you should determine each defendant's liability, if any, separately.



## FINAL INSTRUCTION NO. 7 – ACTUAL DAMAGES

If you find in favor of Klingenberg, then you must award Klingenberg such sum as you find will fairly and justly compensate Klingenberg for any damages you find he sustained as a direct result of the violation of his constitutional rights. You should consider the following elements of damages:

- (1) The physical pain and emotional suffering Klingenberg has experienced and is reasonably certain to experience in the future; whether the injury is temporary or permanent; and any aggravation of a pre-existing condition;
- (2) The reasonable value of the medical care and supplies reasonably needed by and actually provided to Klingenberg; and
- (3) The wages Klingenberg has lost because of his diminished ability to work.

Remember, throughout your deliberations you must not engage in any speculation, guess, or conjecture and you must not award any damages under this Instruction by way of punishment or through sympathy.

FINAL INSTRUCTION NO. 8 – NOMINAL DAMAGES

If you find in favor of Klingenberg under Instruction Number 4 or 5, but you find that Klingenberg's damages have no monetary value, then you must return a verdict for Klingenberg in the nominal amount of One Dollar (\$1.00).

FINAL INSTRUCTION NO. 9 – DUTY TO MITIGATE

If you find Klingenberg was injured as a result of conduct by defendants, you must determine whether Klingenberg could have done something to lessen the harm suffered. Defendants have the burden to prove by the greater weight of the evidence that Klingenberg could have lessened or reduced the harm done to him and that Klingenberg failed to do so. If defendants establish by the greater weight of the evidence that Klingenberg could have reduced the harm done to him but failed to do so, Klingenberg is entitled only to damages sufficient to compensate for the injury that he would have suffered had he taken appropriate action to reduce the harm.

## FINAL INSTRUCTION NO. 10 – PUNITIVE DAMAGES

In addition to the damages mentioned in other instructions, the law permits the jury under certain circumstances to award punitive damages. If you find in favor of Klingenberg under Instruction 4 and if it has been proved that the conduct of Schaunaman was malicious or recklessly indifferent to Klingenberg's right to be free from excessive force, then you may, but are not required to, award Klingenberg an additional amount as punitive damages for the purposes of punishing Schaunaman for engaging in such misconduct and deterring Schaunaman and others from engaging in such misconduct in the future. You should presume that Klingenberg has been made whole for his injuries by the damages awarded under Instruction 7 or 8. If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

- (1) How reprehensible Schaunaman's conduct was. In this regard, you may consider whether the harm suffered by Klingenberg was physical; whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; and whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed Klingenberg;
- (2) How much harm Schaunaman's wrongful conduct caused Klingenberg; and
- (3) What amount of punitive damages, in addition to the other damages already awarded, is needed, considering Schaunaman's financial condition, to punish Schaunaman for his wrongful conduct toward Klingenberg and to deter Schaunaman and others from similar wrongful conduct in the future.

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to Klingenberg.

## FINAL INSTRUCTION NO. 11 – DUTIES DURING DELIBERATIONS

In conducting deliberations and returning your verdict, there are certain rules you must follow.

*First*, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

*Second*, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach an agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

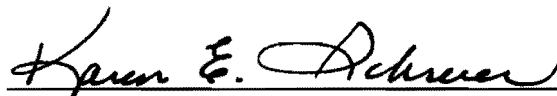
*Third*, if you need to communicate with me during your deliberations, you may send a note to me through the court security officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. **Remember that you should not tell anyone—including me—how your votes stand numerically.**

*Fourth*, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

*Finally*, the verdict form is simply the written notice of the decision that

you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the court security officer that you are ready to return to the courtroom.

Dated March 23, 2012.

A handwritten signature in cursive script, reading "Karen E. Schreier", written in black ink. The signature is positioned above a solid horizontal line.

KAREN E. SCHREIER  
CHIEF JUDGE